

1 TROUTMAN SANDERS LLP
2 Mary Kate Kamka, Bar No. 282911
3 marykate.kamka@troutman.com
4 580 California Street, Suite 1100
5 San Francisco, CA 94104
6 Telephone: 415.477.5700
7 Facsimile: 415.477.5710

5 Attorneys for Defendant
ON DECK CAPITAL, INC.

12 SIDNEY NAIMAN and TERRY
13 FABRICANT, individually and on behalf
of all others similarly situated,

14 || Plaintiff,

15 |

16 ON DECK CAPITAL, INC., and DOES 1 through 10, inclusive, and each of them,

Defendant.

Case No. 4:18-cv-006638-KAW

**ON DECK CAPITAL, INC.'S NOTICE OF
MOTION, MOTION TO DISMISS, OR IN
THE ALTERNATIVE, MOTION TO
TRANSFER, OR IN THE ALTERNATIVE,
MOTION TO STAY, BASED ON THE
FIRST-TO-FILE DOCTRINE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Judge: Hon. Kandis A. Westmore
Date: February 21, 2019
Time: 1:30 PM

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1 **NOTICE OF MOTION AND MOTION TO DISMISS, OR IN THE ALTERNATIVE,**
2 **MOTION TO TRANSFER, OR IN THE ALTERNATIVE, MOTION TO STAY**
3 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE THAT on FEBRUARY 21, 2019, at 1:30 p.m. Defendant On
5 Deck Capital, Inc. (“OnDeck”) will and hereby does move this Court to dismiss, or in the
6 alternative, to transfer, or in the alternative, stay, the class action lawsuit filed by Plaintiffs on
7 October 31, 2018 (Docket No. 1).

8 OnDeck moves this Court for an order dismissing Plaintiffs’ claims pursuant to the first-to-
9 file doctrine, or in the alternative an order transferring the case to the Western District of Virginia,
10 or in the alternative, an order staying the case pending the resolution of *Morgan v. On Deck Capital,*
11 *Inc.*, No. 3:17cv00045, currently pending in the Western District of Virginia.

12 This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points
13 and Authorities, the pleadings and papers on file herein, and such other matters as may be presented
14 to the Court at the time of the hearing.

15 Dated: January 7, 2019

16 TROUTMAN SANDERS LLP

17 By: /s/ Mary Kate Kamka
18 Mary Kate Kamka

19 Attorneys for
20 ON DECK CAPITAL, INC.

1 On Deck Capital, Inc. (“OnDeck”) files this Memorandum in Support of its Motion to Dismiss,
2 or in the Alternative, Motion to Transfer, or in the Alternative, Motion to Stay, Based on the First-
3 to-File Doctrine. The class action lawsuit that Sidney Naiman and Terry Fabricant (collectively
4 “Plaintiffs”) filed in this Court against OnDeck (the “*Naiman Litigation*”) is nearly identical to a
5 class action lawsuit OnDeck has been litigating for over a year against Christopher Morgan in the
6 Western District of Virginia (the “*Morgan Litigation*”). As a result, the Court should dismiss the
7 *Naiman Litigation* under the first-to-file doctrine.

I. Introduction

9 Sidney Naiman and Terry Fabricant are repeat Telephone Consumer Protection Act
10 (“TCPA”) litigants. At current count, they have collectively filed at least thirty-seven (37) TCPA
11 lawsuits in recent years.¹ In fact, they have filed ten additional lawsuits in the two months since
12 they filed the present case – an average of one lawsuit per week. The Court, however, should not
13 allow the *Naiman* Lawsuit to proceed against OnDeck under the first-to-file doctrine. The case is

¹ *Fabricant v. Harbortouch Payments, LLC*, 2:17-cv-03842 (C.D. Cal.); *Fabricant v. Freightquote.com, Inc.*, 2:18-cv-07986 (C.D. Cal.); *Fabricant v. United Card Solutions LLC*, 2:18-cv-01429 (C.D. Cal.); *Fabricant v. First Connect Inc.*, 2:18-cv-04587 (C.D. Cal.); *Fabricant v. The Money Source, Inc.*, 2:18-cv-02449 (E.D.N.Y); *Fabricant v. Fast Advance Funding, LLC*, 2:17-cv-05753 (C.D. Cal.); *Fabricant v. Got Leads 365*, 2:17-cv-06510 (C.D. Cal.); *Fabricant v. Premier Mortgage Resources, L.L.C.*, 2:18-cv-09165 (C.D. Cal.); *Fabricant v. MFS Global, Inc.*, 2:18-cv-04381 (C.D. Cal.); *Fabricant v. Value One Corporation*, 2:18-cv-06771 (C.D. Cal.); *Fabricant v. Reliant Services Group, LLC*, 2:18-cv-07592 (C.D. Cal.); *Fabricant v. Nationwide Capital Solutions Group, Inc.*, 2:18-cv-08128 (C.D. Cal.); *Fabricant v. Mission Capital LLC*, 2:18-cv-08385 (C.D. Cal.); *Fabricant v. Paramount Holdings, LLC*, 2:18-cv-08506 (C.D. Cal.); *Fabricant v. ABC Global Systems, Inc.*, 2:18-cv-08787 (C.D. Cal.); *Fabricant v. Spartan Capital Group, LLC*, 2:18-cv-08985 (C.D. Cal.); *Schaffer et al v. First Choice Payment Solutions G.P.*, 8:18-cv-01981 (C.D. Cal.); *Foote v. Health Insurance Innovations, Inc.*, 8:18-cv-00690 (M.D. Fl.); *Fabricant v. Mission Capital LLC et al.*, 0:18-cv-62566 (M.D. Fl.); *Fabricant v. MFS Global, Inc.*, 2:18-cv-01179 (D. Nev.); *Fabricant, et al. v. Lexington Law Firm*, 2:18-cv-03916 (C.D. Cal.); *Fabricant v. Merchant Funding Solutions, LLC*, 2:18cv09681 (C.D. Cal.); *Fabricant v. Quantum Electronic Payments, LLC*, 2:18-cv-10035 (C.D. Cal.); *Fabricant v. Stoyanov and Hymas*, 2:18-cv-10045 (C.D. Cal.); *Fabricant v. 800Fund.com, LLC*, 2:18-cv-10434 (C.D. Cal.); *Abante Rooter and Plumbing, Inc. et al v. Progressive Business Funding, Inc.*, 3:18-cv-06976 (N.D. Ga.); *Naiman v. Total Merchant Services, Inc., et al.*, 4:17-cv-03806 (N.D. Cal.); *Naiman v. Tranzvia LLC*, 4:17-cv-04813 (N.D. Cal.); *Naiman v. National Bankcard Corporation*, 4:18-cv-06592 (N.D. Cal.); *Abante Rooter and Plumbing et al v. BD Funding Group LLC*, 3:18-cv-06464 (N.D. Cal.); *Naiman v. Safe Step Walk-In Tub Company, Inc.*, 3:18-cv-05888 (N.D. Cal.); *Naiman v. True Renewable Energy, Incorporated et al.*, 4:18-cv-04540 (N.D. Cal.); *Naiman v. Energy Enterprises USA Inc. et al.*, 3:18-cv-04439 (N.D. Cal.); *Naiman v. Sunworks United, Inc.*, 3:18-cv-04272 (N.D. Cal.); *Abante Rooter and Plumbing, Inc. et al. v. Skyline Building Care, Inc.*, 3:18-cv-06909 (N.D. Cal.); *Naiman v. Afortus Financial, LLC*, 3:18-cv-07266 (N.D. Cal.); *Naiman v. AAA Business Funding, Inc.*, 3:19-cv-00022 (N.D. Cal.).

1 nearly identical to the *Morgan* Litigation, which is another purported class action that OnDeck is
 2 currently defending in Virginia.

3 The first-to-file doctrine exists to avoid inefficient use of resources, duplicative litigation,
 4 and inconsistent decisions. Specifically, when a defendant is litigating a lawsuit, and a plaintiff
 5 files a second, overlapping, lawsuit, a court has the discretion to dismiss, stay, or transfer the latter
 6 action, while the first-filed action proceeds. The doctrine is particularly applicable in the context
 7 of parallel class action cases. When a party is defending a nationwide class action, the first-to-file
 8 doctrine prevents a subsequent plaintiff from filing a “piggyback” class action that alleges
 9 overlapping claims on behalf of an overlapping class. One of the purposes of the class action device
 10 is to consolidate individual claims when appropriate. Allowing a subsequent class action to proceed
 11 while a separate class action is being litigated flies in the face of this efficiency goal.

12 The first-to-file doctrine applies when two pending lawsuits meet three requirements – none
 13 of which are overly rigorous. First, the lawsuit being dismissed must be the second-filed action.
 14 Second, the two lawsuits must involve substantially similar parties. Third, the two lawsuits must
 15 involve similar issues. That is all. The *Naiman* Litigation and the *Morgan* Litigation meet each
 16 element. Plaintiffs filed the *Naiman* Litigation nearly a year and a half after *Morgan*. Plaintiffs
 17 bring the *Naiman* Litigation on behalf of many of the same purported class members at issue in
 18 *Morgan*. And Plaintiffs’ claims in *Naiman* are strikingly similar to those in *Morgan*. While
 19 Plaintiffs may file individual lawsuits, under the first-to-file doctrine they cannot proceed with a
 20 class action lawsuit against OnDeck that mirrors another pending class action.

21 II. Background

22 A. The *Morgan* Litigation was filed first.

23 1. On July 10, 2017, Christopher Morgan (“Morgan”) filed a purported Class
 24 Action Complaint against OnDeck under the TCPA. *See Complaint, Morgan v. On Deck Capital,*
 25 *Inc.*, No. 3:17cv00045 (W.D. Va.), ECF No. 1.

26 2. In the Complaint, Morgan alleges that he received a call from OnDeck on
 27 his cellular telephone number on June 19, 2017. *Id.* at ¶ 13.

1 3. He claims that OnDeck placed this call using an automatic telephone dialing
 2 system, which is commonly referred to as an “ATDS” in TCPA litigation. *Id.* at ¶ 14.

3 4. In addition, Morgan contends that OnDeck’s call to him constituted
 4 telemarketing and, as such, violated the TCPA because OnDeck allegedly lacked prior express
 5 consent to place the call. *Id.* at ¶¶ 2, 31.

6 5. Morgan bring his claims individually and on behalf of a purported class of
 7 individuals he defines as:

8 **The Morgan Class:** All persons within the United States (a) to whom On Deck
 9 initiated a telephone call promoting its services, (b) to a cellular telephone number,
 10 (c) using an automatic telephone dialing system or an artificial or prerecorded
 11 voice, (d) at any time four years before the date this action was commenced through
 12 the date of class certification.

13 *Id.* at ¶ 18.

14 6. In articulating the reasons he believes class certification is appropriate,
 15 Morgan alleges that his claims and the purported class members’ claims have many issues in
 16 common. These issues include:

- 17 a. Whether OnDeck used an ATDS;
- 18 b. Whether OnDeck’s calls constituted telemarketing;
- 19 c. Whether OnDeck placed telemarketing calls without prior express
 20 written consent; and
- 21 d. Whether OnDeck violated the TCPA and, if so, what was OnDeck’s
 22 level of culpability.

23 *Id.* at ¶ 23.

24 7. OnDeck and Morgan have been litigating the *Morgan* Litigation for a year
 25 and a half. *See generally* Docket in *Morgan v. On Deck Capital, Inc.*, No. 3:17cv00045 (W.D. Va.
 26 July 10, 2017), attached as **Exhibit A.**

27 **B. The Naiman Litigation was filed over a year after the Morgan Litigation.**

28 8. Over a year after Morgan filed the *Morgan* Litigation, Naiman and Fabricant
 29 filed the present lawsuit. *See* Compl., October 31, 2018, ECF 1.

1 9. In their Complaint, Plaintiffs claim that OnDeck called each of them on their
 2 cellular telephone numbers beginning in March 2017 and ending in July 2017. *Id.* at ¶¶ 9, 15.

3 10. Like Morgan, Plaintiffs allege that OnDeck placed these calls using an
 4 ATDS. *Id.* at ¶ 10.

5 11. In addition, like Morgan, Plaintiffs contend that OnDeck's calls to them
 6 constituted telephone solicitations and, as such, OnDeck violated the TCPA because it allegedly
 7 lacked prior express consent to place the calls. *Id.* at ¶¶ 13, 37b.

8 12. Plaintiffs allege their claims on behalf of purported classes of individuals,
 9 which they categorize as follows:

10 **The Purported ATDS Class:** All persons within the United States who received
 11 any solicitation/telemarketing telephone calls from OnDeck to said person's
 12 cellular telephone made through the use of any automatic telephone dialing system
 13 or an artificial or prerecorded voice for whom OnDeck did not have prior express
 14 consent (either through a lack of affirmative consent or revocation of consent);

15 *Id.* at ¶¶ 21, 22; and

16 **The Purported Do-Not-Call ("DNC") Class:** All persons within the United
 17 States registered on the National Do-Not-Call Registry for at least 30 days, for
 18 whom OnDeck did not have prior express consent (either through a lack of
 19 affirmative consent or revocation of consent), who received more than one call
 20 made by or on behalf of OnDeck that promoted OnDeck's products or services,
 21 within any twelve-month period, within four years prior to the filing of the
 22 complaint.

23 *Id.* at ¶¶ 23, 24.²

24 13. In explaining their basis for class certification, Plaintiffs allege that their
 25 claims and the claims of the purported classes have many issues in common. These issues include
 26 the following:

- 27 a. Whether OnDeck used an ATDS;
- 28 b. Whether OnDeck's calls constituted telemarketing;

26 ² Plaintiffs allege four separate subclasses in their Complaint – separating individuals for whom
 27 OnDeck allegedly lacked prior express consent as an initial matter from those who allegedly
 28 revoked previously-given prior express consent. For ease of reference, OnDeck has grouped these
 29 four subclasses into two for the purpose of this motion.

- c. Whether OnDeck had prior express consent to place the calls; and
- d. Whether OnDeck violated the TCPA and, if so, the extent of the damages.

Id. at ¶¶ 32, 33.

III. Argument

A. The first-to-file doctrine applies when a plaintiff files a subsequent action that involves similar parties and similar issues to the first-filed case.

Under the first-to-file doctrine, when two lawsuits are substantially similar, a district court has the discretion to dismiss, stay, or transfer the latter action, while the first-filed action proceeds. A dismissal, stay, or transfer should be encouraged, as the doctrine ensures that overlapping lawsuits, including class actions, need not proceed on parallel tracks over the defendant’s objection. In short, the first-to-file doctrine is one “of federal comity[,] which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.” *Hilton v. Apple, Inc.*, No. C-13-2167, 2013 U.S. Dist. LEXIS 142354, at *10 (N.D. Cal. Oct. 1, 2013) (quoting *Apple, Inc. v. Pystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011)).

The first-to-file doctrine has several animating purposes. First, the doctrine serves to “promot[e] efficiency....” *Id.* (quoting *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991)). It does this by avoiding substantially redundant lawsuits proceeding simultaneously. Second, the rule helps to ““prevent[] the risk of inconsistent decisions that would arise from multiple litigations of identical claims.”” *Id.* (quoting *Ruckus Wireless, Inc. v. Harris Corp.*, 11-cv-019440-LHK, 2012 U.S. Dist. LEXIS 22336, 2012 WL 588782 (N.D. Cal. Feb. 22, 2012); citing *Church of Scientology v. U.S. Dep’t of the Army*, 611 F.2d 738, 750 (9th Cir. 1979)). Given these purposes, courts caution that the doctrine “should not be disregarded lightly.” *De La Cruz v. Target Corp.*, No. 18cv0867, 2018 U.S. Dist. LEXIS 135586, at *3 (S.D. Cal. Aug. 8, 2018) (quoting *Alltrade, Inc.*, 946 F.2d at 623).

Under the first-to-file doctrine, a district court has discretion to dismiss the second-filed case, stay the case, or transfer the case to another district. *See Vigil v. Colgate-Palmolive Co.*, No. 17-00929, 2017 U.S. Dist. LEXIS 60688, at *1-2 (N.D. Cal. Apr. 20, 2017) (“That rule embodies

1 principles of comity and permits a court to transfer, stay, or dismiss an action when a similar
 2 complaint has been filed in another district court.”) (citations omitted). In conducting its analysis,
 3 a court examines three factors: (1) the chronology of the two actions; (2) the similarity of the parties;
 4 and (3) the similarity of the issues. *Id.* at *2 (citations omitted). Each factor here points to
 5 dismissing the *Naiman* Litigation to allow the *Morgan* Litigation to proceed on its own.

6 **B. Chronology of the two actions: There is no dispute that the *Morgan***
 7 **Litigation was filed before the *Naiman* Litigation.**

8 The first factor in applying the first-to-file doctrine is the chronology of the actions. In the
 9 words of one court, “[t]he first-to-file rule simply requires a chronology of the actions.” *Wallerstein*
 10 *v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1294 (N.D. Cal. 2013). If the action in which
 11 a defendant seeks dismissal was the second-filed action, that factor counsels in favor of dismissal.
 12 *See Bodley v. Whirlpool Corp.*, No. 17cv5436, 2018 U.S. Dist. LEXIS 88013, at *5-6 (N.D. Cal.
 13 May 24, 2018) (“The first factor, chronology, weighs in favor of applying the first-to-file rule
 14 because the *Burch* lawsuit was filed first.”) Moreover, this factor is amplified – pushing harder
 15 toward dismissal – if there has already been significant litigation in the first-filed case. *See W. Pac.*
 16 *Signal, LLC v. Trafficware Grp., Inc.*, No. 18cv02307, 2018 U.S. Dist. LEXIS 106875, at *9-10
 17 (N.D. Cal. June 25, 2018) (dismissing an action under the first-to-file doctrine and highlighting that
 18 the first action has “progressed further than this action has....”).

19 Here, there is no dispute that the *Morgan* Litigation is the first-filed action. *Morgan* filed
 20 his purported class action lawsuit in the Western District of Virginia on July 10, 2017. *See*
 21 *Complaint, Morgan v. On Deck Capital, Inc.*, No. 3:17cv00045 (W.D. Va. July 10, 2017), ECF No.
 22 1. *Naiman* and *Fabricant* did not file the *Naiman* Litigation until October 31, 2018. This was nearly
 23 sixteen months after the *Morgan* Litigation. This factor points in favor of dismissal.

24 Further, there has been almost no litigation in the *Naiman* Litigation to date. Neither party
 25 has taken any discovery, the Court has not held any conferences, and the present motion is
 26 *OnDeck*’s first pleading. On the other hand, the parties have been litigating the *Morgan* Litigation
 27 for a year and a half. The parties have engaged in discovery, conducted conferences with the Court,
 28 and *OnDeck* has filed a motion for summary judgment. *See generally* Docket in *Morgan v. On*

1 *Deck Capital, Inc.*, No. 3:17cv00045 (W.D. Va. July 10, 2017), attached as Exhibit A. These facts
 2 make dismissal in favor of the *Morgan* Litigation even more appropriate here. *See Intersearch*
 3 *Worldwide, Ltd. v. Intersearch Group, Inc.*, 544 F. Supp. 2d 949, 963 (N.D. Cal. Mar. 18, 2008)
 4 (dismissing a second-filed case in favor of the case that had “a more developed case file”).

5 **C. Similarity of the Parties: Plaintiffs seek to represent the same purported class**
 6 **of individuals at issue in the *Morgan* Litigation.**

7 The second factor in the Court’s analysis is the similarity of the parties. In applying this
 8 factor, the Ninth Circuit holds that “the first-to-file rule does not require exact identity of the
 9 parties.” *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015)
 10 (citations omitted). “Rather, the first-to-file rule requires only substantial similarity of parties.” *Id.*
 11 Moreover, “in assessing the similarity of parties in a class action, courts compare the classes, not
 12 the class representatives.” *Bodley*, 2018 U.S. Dist. LEXIS 88013, at *6 (citations omitted). When
 13 doing so, courts require “only that the putative classes ‘represent at least some of the same
 14 individuals.’” *Sandusky Wellness Ctr., LLC v. Alere Home Monitoring, Inc.*, No. C 18-04869, 2018
 15 U.S. Dist. LEXIS 211454, at *3-4 (N.D. Cal. Dec. 14, 2018) (quoting *Pedro v. Millennium Prods.,*
 16 *Inc.*, No. 15-cv-05253, 2016 U.S. Dist. LEXIS 69989, at *4 (N.D. Cal. May 27, 2016)). In other
 17 words, this factor is satisfied where there is overlap in the purported classes. *See Bodley*, 2018 U.S.
 18 Dist. LEXIS 88013, at *7 (finding similarity when a subsequent case seeks to certify a purported
 19 class that is subsumed in the first-filed purported class).

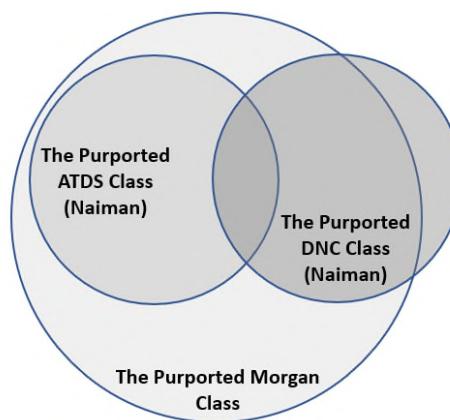
20 The parallels between the *Naiman* Litigation and the *Morgan* Litigation are unavoidable.
 21 As an initial matter, the defendant – On Deck Capital, Inc. – is identical in both cases. But moving
 22 past the defendant, the purported classes in each case cover many of the same purported class
 23 members. In the *Morgan* Litigation, Christopher Morgan describes the class as follows:

24 **The Morgan Class:** All persons within the United States to whom On Deck
 25 initiated a telephone call promoting its services, to a cellular telephone number,
 26 using an automatic telephone dialing system or an artificial or prerecorded voice, at
 27 any time after July 10, 2013.
 28

1 *See Complaint, Morgan Litigation, No. 3:17cv00045 (W.D. Va.), ECF No. 1.*

2 Although Plaintiffs in the *Naiman* Litigation seek to divide their class into a Purported
 3 ATDS Class and a Purported DNC Class, each purported subclass is subsumed in whole or in part
 4 by the class definition in the *Morgan* Litigation. The Purported ATDS Class falls completely within
 5 the purported Morgan Class. They both cover individuals who OnDeck allegedly called on a
 6 cellular telephone using an alleged ATDS or prerecorded voice. A significant portion of the
 7 Purported DNC Class also falls within the purported Morgan Class, although the Purported DNC
 8 Class, as defined, could also include individuals who OnDeck allegedly called on a residential
 9 telephone line or without using a purported ATDS or prerecorded voice. *See* Compl., October 31,
 10 2018, ECF 1, at ¶¶ 21-24. Each purported class also covers an overlapping time period, with the
 11 Morgan class spanning July 10, 2013 through the present day and the purported classes in the
 12 *Naiman* Litigation spanning October 31, 2014 through the present. *See* ECF 1, at ¶ 21 (alleging
 13 that the purported class dates back four years).

14 When using Venn diagram, the purported classes appear as follows:



1 The classes in each case undoubtedly cover “at least some of the same individuals.” *See*
 2 *Sandusky Wellness Ctr., LLC*, 2018 U.S. Dist. LEXIS 211454, at *4. That is all that is needed to
 3 satisfy the second factor. Indeed, courts in the Ninth Circuit consistently find this factor has been
 4 satisfied when, like in the *Morgan* Litigation and *Naiman* Litigation, the purported class in a
 5 second-filed action overlaps the purported class in the first-filed case. The Court should reach the
 6 same conclusion here. *See, e.g. Pedro*, 2016 U.S. Dist. LEXIS 69989, at *12 (finding the factor
 7 satisfied where one class consisted only of purchasers of “Enlightened” beverages and the other class
 8 included purchasers of the “Enlightened” or “Classic” beverages); *Wallerstein*, 967 F. Supp.2d at
 9 1296 (holding that the first-to-file rule applied when both plaintiffs sought to “represent at least
 10 some of the same individuals.”); *Adoma v. Univ. of Phoenix, Inc.*, 711 F. Supp. 2d 1142, 1148 (E.D.
 11 Cal. May 3, 2010) (“Moreover, the proposed classes for the collective actions are substantially
 12 similar in that both classes seek to represent at least some of the same individuals.”).

13 **D. Similarity of the Issues: The plaintiffs in both cases claim that similar issues
 14 are in play.**

15 When applying the third factor, courts examine whether the issues in each case are similar.
 16 *See Bodley*, 2018 U.S. Dist. LEXIS 88013, at *6-7. Courts recognize that the issues do not have to
 17 be identical, as long as they are substantially similar. *Wallerstein*, 967 F. Supp. 2d at 1296. Indeed,
 18 “the rule can apply even if the later-filed action brings additional claims,” provided the cases
 19 involve sufficiently similar issues. *See Koehler v. Pepperidge Farm, Inc.*, No. 13cv02644, 2013
 20 U.S. Dist. LEXIS 128440, at *13-14 (N.D. Cal. Sept. 9, 2013) (quoting *Schwartz v. Frito-Lay N.*
 21 *Am.*, No. C-12-02740, 2012 U.S. Dist. LEXIS 188186, at *8 (N.D. Cal. Sept. 12, 2012)) (“The
 22 issues need not be precisely identical for the first-to-file rule to apply; the rule can apply even if the
 23 later-filed action brings additional claims.”).

24 Here, the allegations applicable to the named plaintiffs in the *Morgan* Litigation and the
 25 *Naiman* Litigation are substantially similar.³ In Morgan’s Complaint, he claims that OnDeck

26
 27 ³ By comparing the named plaintiffs’ allegations in both cases, OnDeck does not concede that any
 28 of the purported classes are certifiable. To the contrary, none of the purported classes satisfy the
 elements of Rule 23 of the Federal Rules of Civil Procedure.

1 placed an automated call to his cellular telephone in June 2017 using an ATDS. *See Complaint,*
 2 *Morgan v. On Deck Capital, Inc.*, No. 3:17cv00045 (W.D. Va.), ECF No. 1, at ¶ 13. He alleges
 3 that this call violated the TCPA because OnDeck allegedly placed it without prior express consent.
 4 *Id.* at ¶ 2. Further, he contends that OnDeck's call to him constituted telemarketing. *Id.* He will
 5 need to prove each element to prevail on his claim.

6 For their part, Plaintiffs make very similar allegations to Morgan. They both claim that
 7 OnDeck called them on their cellular telephone numbers. ECF 1, at ¶ 9. They both claim that
 8 OnDeck placed these calls using an ATDS. *Id.* at ¶ 10. Like Morgan, they both contend that these
 9 calls took place in mid-2017. *See id.* at ¶ 15 (alleging that the calls occurred between March 2017
 10 and July 2017). They allege that OnDeck's calls violated the TCPA because OnDeck did not have
 11 prior express consent to call them. *Id.* at ¶ 13. And, finally, like Morgan, they both assert that
 12 OnDeck's telephone calls to them constituted telemarketing. *See id.* at ¶¶ 21-22 (defining the
 13 purported ATDS class with respect to solicitation/telemarketing calls). To prevail on all of their
 14 claims, they will need to prove each of these elements

15 The plaintiffs in both cases also have strikingly similar views on what issues are common
 16 across the purported classes. It is almost as if the plaintiffs in the *Naiman* Litigation used many of
 17 the purported class allegations in the *Morgan* Litigation as a guide. The chart below includes a
 18 non-exhaustive list of many of the parallel allegations in each case:

Issue	<i>Morgan</i> Allegations	<i>Naiman</i> Allegations
20 All plaintiffs recognize 21 they must prove OnDeck 22 used an ATDS.	A central issue in this case is whether OnDeck "used an ATDS...." Compl. ¶ 23.a	A central issue in this case is whether OnDeck made a call "using any automatic telephone dialing system." Compl. ¶ 32a.
23 All Plaintiffs recognize 24 they must prove OnDeck placed telemarketing calls.	A central issue is whether OnDeck "used an ATDS to send telemarketing calls." Compl. ¶ 23.a	A central issue is whether OnDeck "made any telemarketing / solicitation call..." Compl. ¶ 32a.
25 All Plaintiffs recognize 26 that whether OnDeck had 27 prior express consent to place calls with be a critical issue.	Alleging that OnDeck placed calls to purported class members "without prior express written consent." Compl. ¶ 2.	Claiming that Plaintiffs are typical because OnDeck allegedly placed calls to them "without Plaintiffs' prior express consent." Compl. ¶ 33.

Issue	Morgan Allegations	Naiman Allegations
All Plaintiffs recognize that they must prove whether OnDeck violated the TCPA and, if so, whether it was willful.	Claiming that the Court must determine whether OnDeck violated the statute and, if so, whether it was willful. Compl. ¶ 23c.	Claiming that OnDeck committed a willful violation of the TCPA and seeking enhanced statutory damages. Compl. ¶ 51.
All Plaintiffs recognize that for some (or all) of their claims, they must prove that OnDeck called a cellular telephone service.	Recognizing that showing a call was placed to a “cellular telephone service” is an element of his claim. Compl. ¶ 31.	Incorporating a “cellular telephone” into the Purported ATDS Class definition. Compl. ¶ 21.

In short, Plaintiffs make substantially similar claims against OnDeck individually and on behalf of purported classes. They all contend – and will have to prove – that OnDeck called their cellular telephones using an ATDS in an attempt to make a telemarketing call without prior express consent. And they make these allegations on behalf of overlapping classes covering overlapping time periods. While the plaintiffs may argue their claims are not identical, they cannot escape the fact that they make substantially similar allegations.

When courts in the Ninth Circuit have faced similar situations, they consistently find that the first-to-file doctrine applies. *Pedro*, 2016 U.S. Dist. LEXIS 69989, at *17 (finding two purported class action lawsuits involved similar issues and, therefore, the third factor was satisfied); *Cadenasso v. Metro. Life Ins. Co.*, No. 13cv05491, 2014 U.S. Dist. LEXIS 52750, at *32 (N.D. Cal. Apr. 15, 2014) (finding similarity of issues in two TCPA class actions sufficient to satisfy the third factor); *Wallerstein*, 967 F. Supp.2d at 1297 (holding that the third factor was satisfied when the thrust of both lawsuits is substantially similar); *Ruff v. Del Monte Corp.*, No. C 12-05251, No. C 12-05323, 2013 U.S. Dist. LEXIS 51263, at *9-10 (N.D. Cal. Apr. 9, 2013) (imposing the first-filed doctrine when each of three cases raised similar claims based on similar allegations). The third factor applies here as well.

E. The first-to-file doctrine is particularly applicable in class actions.

Although the first-to-file doctrine applies in a variety of cases, it is particularly relevant in class actions. As one Court in this district recently reiterated, “[l]itigating a class action requires both the parties and the court to expend substantial resources’ and ‘the most important purpose of

1 the first-to-file rule is to conserve these resources by limiting duplicative cases.”” *Henry v. Home*
 2 *Depot U.S.A., Inc.*, No. 14cv04858, 2016 U.S. Dist. LEXIS 117620, at *13 (N.D. Cal. Aug. 31,
 3 2016) (quoting *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 791 (6th Cir. 2016)).
 4 “The potential efficiency gains are particularly heightened where, as here, the class actions involve
 5 overlapping claims and class periods.” *Id.* Accordingly, while a plaintiff may be free to pursue an
 6 individual action without significant concern for a pending uncertified class action, the analysis
 7 changes when he or she tries to bring a parallel, overlapping, class action. Not only is such a course
 8 inefficient, but it creates the risk of inconsistent court decisions pertaining to the same purported
 9 class in multiple different district courts.

10 Given these factors, courts frequently and consistently apply the first-to-file doctrine in the
 11 class action context. *See, e.g. Pars Equality Center v. Pompeo*, No. C18-1222JLR, 2018 U.S. Dist.
 12 LEXIS 209563, at *18 (W.D. Wash. Dec. 12, 2018) (“To allow two parallel class actions to proceed
 13 in separate districts would be duplicative and inefficient.”); *Garcia v. Praxair, Inc.*, No.
 14 3:18cv03887, 2018 U.S. Dist. LEXIS 159413, at *12-16 (N.D. Cal. Sept. 18, 2018) (applying the
 15 first-to-file doctrine in two simultaneous class actions); *Gomez-Ortega v. Déjà vu—San Francisco,*
 16 *LLC*, No. 17-cv-06971, 2018 U.S. Dist. LEXIS 76929, at *8 (N.D. Cal. May 7, 2018) (finding the
 17 first-to-file doctrine applied in a second-filed class action that overlapped a pending class action).
 18 Considering the purpose of the first-to-file doctrine and its applicability to class action cases, the
 19 Court should apply it here.

20 **F. When applying the doctrine here, dismissal is the appropriate remedy.**

21 If the first-to-file doctrine applies, as it does here, the Court has discretion to dismiss the
 22 case, stay the case, or transfer the case. *See Vigil*, 2017 U.S. Dist. LEXIS 60688, at *1-2 (“That
 23 rule embodies principles of comity and permits a court to transfer, stay, or dismiss an action when
 24 a similar complaint has been filed in another district court.”). Dismissal, however, “is proper where
 25 the court of first filing provides adequate remedies.” *Intersearch Worldwide, Ltd.*, 544 F. Supp. 2d
 26
 27
 28

1 at 963. Because the Western District of Virginia provides adequate remedies for Plaintiffs,
 2 dismissal is the appropriate remedy in the *Naiman* Litigation.

3 Here, although Plaintiffs chose to file the case in the Northern District of California, there
 4 are no facts to indicate that a district court in Virginia would be unable to afford Plaintiffs any
 5 remedies to which they are entitled. Moreover, one issue courts frequently examine when deciding
 6 whether to dismiss a case – the statute of limitations – appears to be a non-factor here. Plaintiffs
 7 contend that OnDeck called them between March and July 2017. The limitations period applicable
 8 to TCPA claims is four years. *See Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D. 276, 281
 9 (N.D. Cal. June 18, 2015) (“The TCPA has a four-year statute of limitations.”). This provides
 10 Plaintiffs with ample time to re-file their claims if they choose to do so.

11 Courts in this Circuit do not hesitate to dismiss lawsuits in favor a previously-filed case
 12 when the first-to-file doctrine applies. In fact, the District Court for the Southern District of
 13 California recently provided a compelling explanation for why dismissal, as opposed to a stay or
 14 transfer, is often more appropriate in purported class action cases. In *De La Cruz v. Target Corp.*,
 15 No. 18cv0867, 2018 U.S. Dist. LEXIS 135586, at *6-7 (S.D. Cal. Aug. 8, 2018), the court
 16 recognized that the plaintiffs in a second-filed lawsuit typically have many remedies available to
 17 them in the first-filed lawsuit, which counsels in favor of dismissal. For example, if the first-filed
 18 lawsuit settles on a class basis, the plaintiffs in the second lawsuit can obtain adequate relief through
 19 that settlement. Or the plaintiffs may opt-out of any class settlement in the first-filed lawsuit and
 20 pursue their claims individually. And, even without a settlement, the plaintiffs in the second-filed
 21 lawsuit are not precluded from re-filing their lawsuit on an individual (non-class) basis. *Id.*

22 What *Naiman* and *Fabricant* should not be permitted to do, however, is what they have done
 23 here. They cannot file – as one of their *thirty-seven* TCPA lawsuits – a case that is substantially
 24 similar to the *Morgan* Litigation and force OnDeck to litigate parallel, overlapping, *class actions*.
 25 In that situation, courts frequently prevent the second-filed action from moving forward in the
 26 interest of judicial economy and efficiency. The Court should dismiss Plaintiffs’ claims here. *See*

⁴ *Intersearch Worldwide, Ltd.*, 544 F. Supp. 2d at 963 (finding that dismissal is the appropriate remedy in that case under the first-to-file doctrine).

IV. Conclusion

Because the *Naiman* Litigation and the *Morgan* Litigation satisfy each element of the first-to-file doctrine, the Court should dismiss the *Naiman* Litigation. If the Court is not inclined to dismiss the action, it should transfer the case to the Western District of Virginia.

Dated: January 7, 2019

TROUTMAN SANDERS LLP

By:/s/ Mary Kate Kamka
Mary Kate Kamka

Attorneys for
ON DECK CAPITAL, INC.

⁴ If the Court declines to dismiss the *Naiman* Litigation under the first-to-file doctrine, it should transfer the case to the Western District of Virginia. This transfer would help to minimize inefficiencies for the court system and reduce the chance of inconsistent rulings. *See, e.g. Ruff v. Del Monte Corp.*, No. C12-052251, 2013 WL 1435230, at *4 (N.D. Cal. Apr. 9, 2013) (transferring a purported class action from the Northern District of California to the Western District of Pennsylvania under the first-to-file doctrine when considering factors such as costs and potential conflicting rulings). If the Court declines to dismiss and also declines to transfer the *Naiman* Litigation, it should stay the case pending resolution of the *Morgan* Litigation.

Exhibit A

3:17-cv-00045-NKM-JCH Morgan v. On Deck Capital, Inc.

Norman K. Moon, presiding

Joel C. Hoppe, referral

Date filed: 07/10/2017**Date of last filing:** 12/26/2018

History

Doc. No.	Dates	Description
1	<i>Filed:</i> 07/10/2017 <i>Entered:</i> 07/11/2017	Complaint
2	<i>Filed & Entered:</i> 07/11/2017	Electronic Summons Issued
3	<i>Filed & Entered:</i> 08/01/2017 <i>Terminated:</i> 08/02/2017	Motion for Extension of Time to File Answer
4	<i>Filed & Entered:</i> 08/01/2017	Positive Corporate Disclosure Statement
5	<i>Filed & Entered:</i> 08/02/2017	Order on Motion for Extension of Time to Answer
6	<i>Filed & Entered:</i> 08/11/2017	Notice of Appearance
7	<i>Filed & Entered:</i> 08/21/2017	Answer to Complaint
8	<i>Filed & Entered:</i> 08/21/2017 <i>Terminated:</i> 09/20/2017	Motion to Stay
9	<i>Filed & Entered:</i> 08/21/2017	Brief / Memorandum in Support
10	<i>Filed & Entered:</i> 08/21/2017	Pretrial Order
11	<i>Filed & Entered:</i> 08/24/2017	Notice of Hearing on Motion
12	<i>Filed & Entered:</i> 08/29/2017	Notice (Other)
13	<i>Filed & Entered:</i> 09/05/2017	Response in Opposition to Motion
14	<i>Filed & Entered:</i> 09/08/2017	Affidavit of Service
15	<i>Filed & Entered:</i> 09/12/2017	Reply to Response to Motion
16	<i>Filed & Entered:</i> 09/15/2017	Report of Rule 26(f) Planning Meeting
17	<i>Filed & Entered:</i> 09/20/2017	Order on Motion to Stay
18	<i>Filed & Entered:</i> 09/26/2017	Notice of Cancellation of Hearing
19	<i>Filed & Entered:</i> 03/23/2018	Notice (Other)
20	<i>Filed & Entered:</i> 03/29/2018	Order
21	<i>Filed & Entered:</i> 04/13/2018	Report of Rule 26(f) Planning Meeting
22	<i>Filed & Entered:</i> 05/18/2018 <i>Terminated:</i> 05/21/2018	Motion to Appear Pro Hac Vice
23	<i>Filed & Entered:</i> 05/21/2018	Order on Motion to Appear Pro Hac Vice
24	<i>Filed & Entered:</i> 06/20/2018	Notice (Other)
25	<i>Filed & Entered:</i> 06/29/2018	Notice of Hearing
26	<i>Filed:</i> 07/06/2018 <i>Entered:</i> 07/09/2018	Pretrial Conference - Initial
27	<i>Filed & Entered:</i> 07/30/2018	Pretrial Order
28	<i>Filed & Entered:</i> 07/30/2018	Notice of Hearing

<u>29</u>	Filed & Entered: 08/10/2018	Notice (Other)
<u>30</u>	Filed & Entered: 08/10/2018	Notice of Change of Address
<u>31</u>	Filed & Entered: 08/21/2018 Terminated: 08/22/2018	Motion for Protective Order
<u>32</u>	Filed & Entered: 08/22/2018	Order on Motion for Protective Order
<u>33</u>	Filed & Entered: 10/31/2018 Terminated: 11/05/2018	Motion for Extension of Time to Complete Discovery
<u>34</u>	Filed & Entered: 11/05/2018	Order on Motion for Extension of Time to Complete Discovery
<u>35</u>	Filed & Entered: 12/11/2018	Motion for Summary Judgment
<u>36</u>	Filed & Entered: 12/11/2018	Brief / Memorandum in Support
<u>37</u>	Filed & Entered: 12/12/2018	Additional Evidence
<u>38</u>	Filed & Entered: 12/26/2018	Response in Opposition to Motion

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